83-129
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In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

CLYDE HOLLOWAY, ET AL., PETITIONERS

v.

VIRGIE LEE VALLEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court exceeded its remedial authority in *sua sponte* framing a desegregation decree for Rapides Parish, Louisiana, which closed two small rural communities' only schools, one predominantly black (Lincoln Williams) and one predominantly white (Forest Hill), and ordered the racial mixing of their entire student bodies, kindergarteners included, in another community located 10 miles midway between the closed schools where (1) no factual proof exists and no findings of fact were made by the district court linking the racial composition of Lincoln Williams and Forest Hill Schools to segregative actions on the part of the Rapides Parish School Board; (2) such a decision deprives the small rural towns of Cheneyville and Forest Hill, Louisiana, of their only schools built and maintained at the expense of local taxpayers; and (3) less drastic remedial alternatives were available to the district court.

2. Whether the district court applied the proper legal standard in insisting upon "the greatest amount of integration" as its "sole purpose," to the neglect of countervailing equitable considerations, including the value of a rural community's only school and the demonstrable risk to the safety and educational well-being of five-year-olds in busing them upwards of 30 miles and two hours a day.

3. Whether the district court erred in substituting its own view of the physical condition of the Lecompte schools for the judgment of the Rapides Parish School Board.

PARTIES TO THE PROCEEDING

Clyde Holloway was an intervenor below and is a petitioner here. He represents a class of citizens opposed to the closing of Forest Hill Elementary School, which is in Rapides Parish, Louisiana. Virgie Lee Valley and others represent a class of black citizens of Rapides Parish; they were plaintiffs below and are respondents herein. The Rapides Parish School Board, its individual members, and the Superintendent of Schools, Mr. E. Allen Nichols, were defendants below; they seek certiorari here in a companion petition. The United States of America was a plaintiff-intervenor below and is, presumably, a respondent herein.

INDEX

INDEX (Continued)

INDEX (Continued)

INDEX (Continued)

TABLE OF AUTHORITIES

CASES: *Page*

TABLE OF AUTHORITIES (Continued)

Page

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES

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Petitioners, Clyde Holloway, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on March 30, 1983.

OPINIONS BELOW

The March 30, 1983 opinion of the Court of Appeals is reported at 702 F.2d 1221 and is reprinted in the separate Appendix to this Petition, pp. 1a-21a. The May 18, 1981 opinion of the Court of Appeals, reversing the District Court and remanding, is reported at 646 F.2d 925 (App., *infra*, 42a-75a). The District Court's Preliminary Opinion of June 6, 1980 is unreported (App., *infra*, 95a-98a). The District Court's August 6, 1980 opinion is reported at 499 F.Supp. 490 (App., *infra*, 82a-94a). The District Court's July 22, 1981 opinion on remand is unreported (App., *infra*, 27a-40a).

JURISDICTION

The judgment of the Court of Appeals was entered March 30, 1983. Forest Hill Intervenors' petition for rehearing and rehearing en banc was denied on April 29, 1983 (App., *infra*, 24a-25a). Rapides Parish School Board's petition for rehearing and rehearing en banc was denied on May 26, 1983 (App., *infra*, 26a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

1. Introduction

This is a petition by the people of Forest Hill, Louisiana, complaining of the loss of Forest Hill Elementary School, the only school in a small rural community located in Rapides Parish, Louisiana. Petitioners are here seeking review of a split decision of the United States Court of appeals for the Fifth Circuit, which affirmed Judge Scott's decision to close Forest Hill School. An earlier three-judge panel of the Fifth Circuit had unanimously reversed Judge Scott's order closing Forest Hill School and remanded for reconsideration.

2. The Proceedings through July 3, 1980, terminating in Judge Scott's *sua sponte* decision to close Forest Hill School

Forest Hill's petition stems from the district court's response to a motion for supplemental relief filed by the private plaintiffs in 1979. The motion complained of the continued existence of one-race schools in Wards 1, 8, and 9 of Rapides Parish, which

encompass the cities of Alexandria and Pineville. Forest Hill is an incorporated village located in Ward 4, a rural area of the Parish, some 20 miles from Alexandria.[1] Forest Hill Elementary School is the only school in School District 16. It is a modern physical facility consisting of sixteen classrooms, a library, a cafeteria, and a gymnasium, all of which are air-conditioned. The School is situated on ten acres of public property, which include two athletic fields, one of which is equipped with lighting.[2] The citizens of Forest Hill built their first school in 1901. They have maintained a school in Forest Hill ever since by virtue of a separate bonding district and at the expense of the Community's taxpayers.[3]

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[1] Rapides Parish is 1,369 square miles in total area, roughly 40 miles wide and 35 miles long. STATE OF LOUISIANA, GEOLOGICAL SURVEY, WATER RESOURCES BULL. No. 8 (April 1966), p. 4. This case thus involves an area larger than the State of Rhode Island and two and a half times the size of the area in the *Swann* case, which the Chief Justice described as "large" (402 U.S. at 6). A schematic depiction of Rapides Parish, showing the wards in question, appears *infra*, Appendix A, 75a. A map of Rapides Parish, showing the school taxing districts in question, appears *infra*, Appendix Q, 108a.

[2] Response of Rapides Parish School Board to Court's Preliminary Opinion of June 6, 1980 and Order of July 3, 1980 Suggesting a Proposed Plan of Desegregation for Rapides Parish, July 28, 1980 [hereinafter referred to as Board Response], p. 8. Excerpts from the Board Response appear *infra*, Appendix N, 100a.

[3] Forest Hill School started out as a small wooden frame building. In 1911 the Community built a completely new two-story red-brick building. In 1952 the present structure was built, and it was completely renovated in 1966, with the addition of a carpeted library and air-conditioning throughout the buildings. Over the years, a total of $430,000 in assessed millage has been expended by the citizens of Forest Hill in support of their public school.

Most recently, one day after the Fifth Circuit denied rehearing en banc, on April 30, 1983, the citizens of Forest Hill voted to treble their tax assessment to a total of 6 mills for continued maintenance of Forest Hill Elementary School, notwithstanding the fact that the School has been legally dead for three years. This millage will produce an annual revenue of $60,000 for maintenance of Forest Hill School should this Court see fit to save it.

The idea to close Forest Hill Elementary School was Judge Scott's alone, conceived *ex parte* in chambers and announced to the parties in a plan handed down by the trial court on July 3, 1980. Neither the private plaintiffs nor the United States Government as intervenor had ever proposed closing Forest Hill Elementary School as a possible remedy in the Rapides Parish desegregation case. In fashioning his own desegregation plan involving wards and schools outside the scope of the evidence adduced at the April 29, 1980 hearing, Judge Scott not only rejected the plan of the United States Government's expert witness, Dr. Gordon Foster, but announced to the parties that he would draw up the plan himself, saying: "I also feel that I am the best expert that I know and I intend to draw this plan myself." Preliminary Opinion, June 6, 1980, Exhibit A, p. 1 (App., *infra*, 97a).[4]

Judge Scott's plan of July 3, 1980 ordered Lincoln Williams School closed because, as Judge Scott explained in his opinion

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[4] Judge Scott's tentative plan, issued on July 3, 1980, closed Tioga Junior High School — "an excellent physical plant" according to the School Board's response to Judge Scott's plan. Board response, p. 7. Judge Scott later recanted this decision, saying (App., *infra*, 92a): "Our original plan had the very objectionable feature of closing Tioga Junior High School, making the role of that single community far more burdensome than the other junior high schools in the metropolitan area." Judge Scott's tentative plan of July 3, 1980 closed the Poland High School, which caused the Board to say (Board Response, p. 9): "With respect to the Poland area, it must be pointed out that the Court's proposal also requires abandonment of an excellent facility in which the Board has a substantial financial investment. The school, serving grades K-12, is worth approximately $3,000,000.00 and is completely air-conditioned." It was the School Board's view that "closing and abandoning Poland High School as suggested by this Court's proposal is totally unsound from both an educational and an administrative viewpoint." Board Response, p. 9. Judge Scott agreed. Just as he had ordered Tioga Junior High reopened, Judge Scott reopened Poland, making it a K-6 school and assigning to it black students in those same grades from Lincoln Williams School, located in Cheneyville, Louisiana, some 12.6 miles away.

of August 6, 1980 (App., *infra*, 87a): "[T]here is no concentration of white students available in the Cheneyville area to integrate Lincoln Williams Elementary (92.2% black). Consequently Lincoln Williams (K-8) must be closed and its student body assigned to other schools in the Lecompte area." Next, in order to increase the number of whites attending schools in Lecompte, Judge Scott proceeded to close Forest Hill Elementary School and he ordered the entire K-8 student population at Forest Hill to be bused to Lecompte, some ten miles distant from Forest Hill School.[5]

3. The School Board's Response to Judge Scott's Decision To Close Forest Hill School

At an emergency School Board meeting[6] held on July 22, 1980, the Rapides Parish School Board adopted Board member Jo Ann Kellogg's motion urging Judge Scott to reconsider his plan "on account of physical conditions which would jeopardize sound educational programming, particularly as related to

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[5] The panel majority put the distance between Forest Hill and Lecompte as "approximately nine miles" (App., *infra*, 9a). The district court found the distance to be 9.7 miles (App., *infra*, 29a), which adds almost two miles extra a day round-trip. And there is uncontested record testimony showing that the young K-3 children are bused 2.2 miles and twenty-five minutes within the city limits of Lecompte before starting the return trip home. See note 7, *infra*. A map showing the bus routes for 1979-80 elementary schools, prior to the closing of Forest Hill and Lincoln Williams Schools, appears *infra*, Appendix R, 109a.

[6] Through their attorney the people of Forest Hill filed a petition for intervention in this case on August 1, 1980. This petition sought to contest Judge Scott's *ex parte* decision to close Forest Hill School and prayed for an opportunity to adduce record evidence showing the factual assumptions of Judge Scott's July 3, 1980 opinion regarding the location of Forest Hill students and the distances they would have to be bused under Judge Scott's plan to be in error. Judge Scott, however, denied Forest Hill's intervention petition the same day it was filed and he then cancelled the formal hearing scheduled for August 1, 1980 because, according to Judge Scott, "no new evidence existed." Order, August 11, 1980, p. 3.

Group 5 — Forest Hill, Lincoln Williams, Poland, Lecompte, C.C. Raymond, and Rapides High . . . ." Board Response, p. 5. Mrs. Kellogg urged the reopening of Forest Hill School as a K-3 school serving both the Forest Hill and the Lecompte areas. She also suggested that Lecompte Elementary School be closed because of its age and condition and that its student population be bused to Forest Hill for grades K-3. See Board Response, Exhibit G, p. 1. With respect to the physical conditions at Lecompte Elementary and Carter C. Raymond, Board member Kellogg stated (Board Response, Exhibit G, p. 2) (App., *infra*, 106a):

> "The campuses at Lecompte Elementary and Carter C. Raymond are located in a highly congested area within 1/2 block of each other. There presently exists problems with bus loading and unloading, staff parking, public access not only to the schools but to the residences surrounding the schools. These facilities are surrounded by very narrow streets. The addition of the volume of students to be added to these facilities would compound these problems immeasurably and create additional problems of safety both to the citizens of the community and the students and staff of the school facilities. These problems do not exist in the schools outside the Lecompte area."

Board member Charles Holloway in his response to Judge Scott's proposed plan stated in part (Board Response, Exhibit E, p. 1): (App., *infra*, 103a): "The safety factor *alone* should convince the Court to reconsider its proposed plan. The one-story structure at Forest Hill is far superior to the three-story structure of Lecompte Elementary."

4. Judge Scott's final order and opinion of August 6, 1980

On August 6, Judge Scott entered a final order closing both Lincoln Williams and Forest Hill Elementary Schools. In its opinion, the trial court stated (App., *infra*, 89a):

> "This plan achieves our sole purpose, the greatest amount of integration with a reasonably assured prospect of success."

On August 27, 1980 a hearing was held on the School Board's motion to modify the trial court's desegregation plan. The Board objected to closing "good, usable school facilities" (Tr. August 27, 1980 Proceedings, p. 6) and to busing "in some instances, busing kids forty miles, not just right next door." (Tr. August 27, 1980 Proceedings, p. 27). The trial court denied the Board's motion to modify, saying (Tr. August 27, 1980 Proceedings, pp. 34-35):

> "My task here is to accomplish that integration, the required integration, and what we are talking about is racially black identifiable schools. That is the name of the game. . . . And the logistical expense I feel is not something that this Court can take any notice of. It is merely logistical expense against a constitutional right, it is just that simple."

5. The Fifth Circuit's decision in *Forest Hill I*

On May 18, 1981, a unanimous panel of the Fifth Circuit Court of Appeals reversed Judge Scott's decision closing Lincoln Williams and Forest Hill Elementary Schools. The Fifth Circuit found no adequate justification supported in the record on which to approve the closing of Forest Hill and Lincoln Williams Schools. The judgment of the district court was reversed and the matter was remanded to Judge Scott.

6. The proceedings on remand

On remand, Judge Scott *sua sponte* reversed his earlier decision denying the Forest Hill intervention and allowed Mr. Roy, representing the people of Forest Hill, to participate in the ordered re-examination of specific desegregation measures for southeastern Rapides Parish. The private plaintiffs, the

United States Government, the School Board, and the Forest Hill intervenors all participated in an evidentiary hearing held on June 30, 1981 to consider alternatives to Judge Scott's plan. The School Board proposed closing one of the Lecompte schools. According to data worked up by School Board officials, under this alternative Forest Hill would have forty percent black, Lecompte would be fifty-four percent black, Poland thirty-eight percent black, and Lincoln Williams would be forty-eight percent black. Tr. June 30, 1981 Proceedings, p. 20. The private plaintiffs submitted a plan that re-opened Forest Hill as a K-5 school and Lincoln Williams as a sixth grade center, with children coming to the latter from Forest Hill, Cheneyville, Poland, and Lecompte. Tr. June 30, 1981, Proceedings, p. 8. Other less drastic alternatives were submitted on remand, including a proposal supported by private plaintiffs, the School Board, and Forest Hill intervenors to allow both Cheneyville and Forest Hill, Louisiana, to keep their young children in grades K-3 at home in their own community.

7. Forest Hill's evidence on remand

Mr. Parks W. Sansing, an employee of the Rapides Parish School Board, was called as an expert witness by the Forest Hill intervenors in connection with Forest Hill Exhibit 13, a map showing student pick-ups and the distances travelled by the various bus drivers in the Forest Hill district. Mr. Sansing testified that the map he prepared shows that only 3 of 311 former Forest Hill Elementary School students live closer to Lecompte than to Forest Hill. Tr. June 30, 1981 Proceedings, p. 53. The evidence adduced by Mr. Sansing, including Forest Hill 13, shows that under Judge Scott's plan a total of 181 students must be bused past Forest Hill Elementary School and then on to Lecompte, adding another 25 miles and approximately 60

minutes busing time a day.[7] Mr. Roy for Forest Hill attempted to put into evidence the testimony of bus drivers familiar with the difficulties of traveling from Forest Hill to the Lecompte schools, but Judge Scott excluded this testimony as irrelevant. Tr. June 30, 1981 Proceedings, p. 56. In response, Mr. Roy made an offer of proof stating (*id.* at 70): "And if the bus drivers were called . . . they would testify that they have had — they recalled accidents on the bus where the little kindergarten kids, one would fall asleep, fall on the floor, and ruin their pants, and that is what they would testify to." The last witness for Forest Hill was Dr. Jack Wright, Jr., a rural sociologist with a Ph.D. in sociology from Louisiana State University. Dr. Wright testified regarding the importance of Forest Hill School to the community.[8] No other parties put on any evidence at the

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[7] A copy of Forest Hill Exhibit 13 appears *infra*, App. S, 110a. Contrary to the intimation of the panel majority (App., *infra*, 13a n.10), this map pertains only to former Forest Hill Elementary School students. As explained by Mr. Sansing: "I used the trip sheets of the last school year Forest Hill was in session, and from that trip sheet took a master map, placed each bus driver's stop and the number of students that he picked up at each stop in School District 16, concerning Forest Hill Elementary School, Grades K through 8." Tr. June 30, 1981 Proceedings, p. 51. Mr. Sansing also testified, with respect to kindergarteners through third-graders, that these pupils are bused under Judge Scott's plan a total of 2.2 miles, consuming approximately twenty to twenty-five minutes, and twice crossing railroad tracks paralleling Louisiana Highway 71, a busy four-lane thoroughfare, without ever having so much as left the city limits of Lecompte as buses move from Lecompte Elementary to Carter C. Raymond and thence to Rapides High School before beginning the trip back to Forest Hill. Tr. June 30, 1981 Proceedings, p. 57.

[8] "[I]t is organized around that school. It is the one thing which they have in common, and there is the raison d'etre to the community, without which nothing, or it is how they come together to affirm their oneness as a community. . . . And that is why they are so cohesive in their desire to keep it, because it represents their way of life." Tr. June 30, 1981 Proceedings, pp. 75-76. Compare the plea of the Cheneyville Concerned Citizens Group:

> "It is our prayer that the Lincoln Williams Elementary and the Forest Hill Elementary schools be reopened. The school is the only source of

hearing on June 30th, nor did the other litigants question Forest Hill's evidence in any way.[9]

8. Judge Scott's decision on remand

Judge Scott was unpersuaded by any of the evidence adduced at the hearing on June 30; nor was he satisfied with any of the alternative plans submitted by private plaintiffs, the School Board, and the Forest Hill intervenors. In an opinion handed down on July 22, 1981, Judge Scott adhered to his earlier decision closing both Lincoln Williams and Forest Hill Schools. Once again, Forest Hill took its case to the Fifth Circuit Court of Appeals.

9. The Fifth Circuit's decision in *Forest Hill II*

On Forest Hill's second appeal, the Fifth Circuit split 2 to 1, affirming the decision to close both Lincoln Williams and Forest Hill Schools. Citing language from this Court's opinion in *Swann*, the majority reasoned (App., *infra*, 6a) that even "bizarre" plans are constitutional, and that there is no exception that would allow a court to save a rural community's only school. All grades must be bused, said the majority, citing this Court's recent denial of certiorari in the Nashville school case, *Kelley* v. *Nashville Metropolitan County Board of Education*, 687 F.2d 814 (6th Cir. 1982), *cert. denied* 459 U.S. ____ (1983).

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recreation and is the community center for our community. What is a community without a church and a school?"

R I, p. 3 ["R" refers to the Record on Appeal when this case reached the Fifth Circuit the second time; "I" is the Volume no.].

[9] At the conclusion of the hearing, Mr. Berry, counsel for the private plaintiffs, told Judge Scott (Tr. June 30, 1981 Proceedings, pp. 89, 90):

> "In behalf of private plaintiffs, I would like to make this statement that private plaintiffs are not — do not desire to have any school closed up, if we can possibly keep them open. . . . I want to make that crystal clear so that no one in the community would believe that private plaintiffs are attempting to close down any school."

The majority did not mention the fact that the trial court had allowed three all-black K-2 neighborhood schools to remain intact in Alexandria. This exception was deleted from the majority's recitation of facts by the use of an ellipsis (App., *infra*, 3a). The majority conceded that the trial court's plan did involve excessive busing for some of Forest Hill's children (App., *infra*, 13a-14a n.10). Nevertheless, the majority affirmed. Chief Judge Clark, in dissent, did not think equity so draconian.

REASONS FOR GRANTING THE WRIT

Introduction

This case raises grave questions regarding the exercise of, and the limits to, federal judicial power in desegregation cases. No opinion of this Court suggests federal judges can close good schools against the wishes of the school board where less drastic remedial alternatives are available. The decision below not only usurps local control of education, but it plainly carries federal courts into realms of policy and plant management better left to local school officials. Nothing in *Brown II* or *Swann* requires the reciprocal destruction of black and white schools and the busing of five-year-olds upwards of 40 miles and two hours a day. The decision of the Fifth Circuit panel majority adopts far too rigid an interpretation of *Swann*, and the district court's decision is likewise tainted by a single-mindedness of purpose and a logical extremism[10] wholly out of line with the equitable teachings of *Swann*. The approach of the district court and the panel majority is in conflict with the decisions of six other Circuit Courts of Appeals, which rightly leave questions regarding utilization of school facilities to the

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[10] The words of Holmes, if we may borrow them, are a telling reply to the absolutism of the trial court and the panel majority below. Holmes's thinking

sound discretion of local school boards. To the extent the decision below requires the busing of five-year-olds two hours a day, it is in conflict with this Court's decision in *Swann* and with an en banc decision of the Fourth Circuit Court of Appeals. Lower courts, we submit, are sorely in need of guidance regarding the proper interpretation of *Swann*, particularly as it affects elementary-age children. See *Austin Independent School District* v. *United States*, 429 U.S. 990, 991 (1976) (Powell, J. concurring). A ruling that destroys a rural community's only school and drives its children, both black and white, out of their public school and into a Baptist church for their schooling imperatively calls for corrective review by this Court.

I.

THE TRIAL COURT AND THE PANEL MAJORITY ERRED IN ESTABLISHING AS THEIR "ONE ALL-ENCOMPASSING PURPOSE: THE ADOPTION OF A PLAN WHICH ACHIEVES THE GREATEST AMOUNT OF INTEGRATION" (499 F.Supp. at 491). THIS WAS WRONG. INTEGRATION FOR INTEGRATION'S SAKE IS NOT A CONSTITUTIONAL REQUIREMENT.

Dismantling a dual school system, this Court has said, "does not require any particular racial balance in each 'school, grade, or classroom.' " *Milliken* v. *Bradley*, 418 U.S. 717, 740-41 (1974). The trial court's salt and pepper theory of the case (Tr. Jan. 15, 1981 Proceedings, p. 45):

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is our answer to those who would kill a school in order to desegregate it:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all are in fact limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

Hudson Water Co. v. *McCarter*, 209 U.S. 349, 355 (1908).

> "You have to have in the schools white and black children alike . . . so some whites have to go to schools that were formerly black, located in black communities, and some blacks have to go to the white community,"

is contradicted by higher authority. *Swann* v. *Board of Education*, 402 U.S. 1, 26 (1971); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417 (1977). Integration for integration's sake is not, as the trial court expressed it (Tr. Jan. 15, 1981 Proceedings, p. 45), "the name of the game."

II.

THE TRIAL COURT AND THE PANEL MAJORITY ERRED IN IMPOSING A REMEDY BEYOND THE SCOPE OF THE VIOLATION CONTRARY TO THE REASONING OF *MILLIKEN* v. *BRADLEY*.

A. Nothing in the Remedial Principles of *Brown II* or *Swann* Sanctions the Theory Espoused by the Trial Court and Affirmed by the Panel Majority of the Reciprocal Destruction of Black and White Schools for Purposes of Integration.

The Fifth Circuit, in its first panel opinion in this case, said (App., *infra*, 65a): "As far as we can determine, the only justification for closing Lincoln Williams was its predominance of black pupils." Obviously the members of the panel in *Forest Hill I* wanted to know why Judge Scott had closed Lincoln Williams School. On remand Judge Scott made it crystal clear (App., *infra*, 29a) that he closed Lincoln Williams because he feared whites would not attend it. We submit that if the School Board had suggested closing Lincoln Williams because of a fear of white flight, this Court would not hesitate to declare such action in violation of the Equal Protection Clause of the Fourteenth Amendment. *United States* v. *Scotland Neck Bd. of Educ.*, 407 U.S. 484, 491 (1972). Yet it is plain from his own

words that Judge Scott did exactly the same thing when he closed Lincoln Williams School. Hence we say that the trial court's decision to close Lincoln Williams for fear that whites would not attend it which, in turn, led to the reciprocal demise of Forest Hill School, deprives black students at Lincoln Williams and white students at Forest Hill of equal protection of the law. *Accord*, *United States* v. *Texas Education Agency*, 467 F.2d 848, 871-72 (5th Cir. 1972) (en banc) (Wisdom, J.) (district court's fear of "white flight" unacceptable as basis for closing black school). Judge Scott's expert plan thus got off to a grotesque start. Nothing in the remedial principles of *Brown II* or *Swann* allows a federal judge to ignore the commands of the Fifth Amendment while purporting to remedy a violation of the Fourteenth Amendment. Judge Scott's principle of reciprocal destruction of good schools (App., *infra*, 32a):

> "It was not fair to the black community nor legally proper that only identifiably black schools be closed for purposes of integration,"

is unwarranted in law and contrary to the reasoning of the elder Mr. Justice Harlan in *Cumming* v. *Board of Education*, 175 U.S. 528 (1899).[11] The same kind of practical wisdom continues to shape this Court's thinking about how far equitable remedial

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[11] In the *Cumming* case, Justice Harlan stopped short of requiring the reciprocal destruction of black and white schools in the name of equal protection, saying (175 U.S. at 544):

> "The substantial relief asked for is an injunction that would either impair the efficiency of the high school provided for white children or compel the Board to close it. But if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools. The colored school children of the country would not be advanced in the matter of their education by a decree compelling the defendant Board to cease giving support to a high school for white children."

power extends in school desegregation cases. *Swann*, *supra*; *Milliken* v. *Bradley*, 418 U.S. 729 (1974). To put it in the simplest terms, the district court's doctrinaire approach goes too far. Nothing in the cases cited by the panel majority, nor in the *equitable* remedial principles of *Brown II* or *Swann*, authorizes a federal judge who closes a black school for fear whites will not attend it, to close a good white school by way of *quid pro quo*. Such a result wastes thousands of tax dollars, deprives both blacks and whites at Lincoln Williams and Forest Hill of their only schools, and is plainly punitive in nature.[12]

We submit that the reasoning of *Milliken* v. *Bradley*, 418 U.S. 729, 745 (1974), which delineates the permissible scope of remedial authority in desegregation cases, governs here and mandates reversal.[13] True, this case does not involve separate school districts as in *Milliken*. But separate wards and separate bonding districts are involved. According to Superintendent Nichols's testimony (Tr. April 29, 1980 Proceedings, p. 128): "[Y]ou have two different bonding districts there. Forest Hill is the School District Number 16, they have their own bond, they built that school."

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[12] Contrary to the suggestion of the panel majority (App., *infra*, 9a n.7), nothing in *Morgan* v. *McDonough*, 689 F.2d 265 (1st Cir. 1982), or in *Mitchell* v. *McCunney*, 651 F.2d 183 (3d Cir. 1981), supports the bizarre result reached in this case. In *Morgan* the district court was only following the wishes "of *all* parties" (689 F.2d at 273) (emphasis in original) in ordering Richards Elementary School closed. What is even more telling, the trial court in *Morgan* reversed itself and ordered Conley Elementary School reopened when Boston school officials objected. *Id.* Likewise in *Mitchell* the facts show that the district court was acting only at the behest of the school board in closing the schools in question. See 651 F.2d at 186.

[13] Surely the element of surprise is the same. As far back as 1970 the Fifth Circuit itself treated the legal issues in the Rapides Parish School desegregation case on a ward by ward basis, ruling that further relief was necessary in only wards 1 and 8. *Valley* v. *Rapides Parish School Board*, 434 F.2d 144 (5th Cir. 1970).

B. Nothing in the Record or in the Trial Court's Opinions in This Case Links the Post-1970 Change in the Racial Mix of the Lecompte Area Schools to Segregative Actions Chargeable to the Rapides Parish School Board. This Failure of Proof Is Fatal.

Judge Scott's unexplained conclusion in his Preliminary Opinion of June 6, 1980 (App., *infra*, 95a) that "the Rapides Parish School system is not unitary and that additional relief must be granted" is left wholly unelaborated in his final opinion of August 6, 1980.[14] While there is no doubt that federal courts have authority to grant appropriate relief when constitutional violations on the part of school officials are proved, this Court's cases

> "have just as firmly recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley*, 418 U.S. 717, 741-742 (1974); *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 50 (1973); *Wright* v. *Council of City of Emporia*, *supra* [407 U.S. 451 (1972)], at 469. It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles. Cf. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976)."

Dayton Board of Education v. *Brinkman*, 433 U.S. 406, 410 (1977). *Accord*, *Austin Independent School District* v. *United*

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[14] It is quite revealing — and most distressing — that at the outset of the April 29, 1980 hearing, when this matter got started some three years ago, Judge Scott admitted on the record: "I don't know what a unitary system is from the point of view of specifics." Tr. April 29, 1980 Proceeding, p. 32. This is not to blame the trial court. It is only to emphasize the need for further guidance from this Court, lest other communities lose their schools by judicial decree. It has happened again. See *Davis* v. *East Baton Rouge Parish School Board*, 514 F.Supp. 869 (M.D. La. 1981), *appeal pending*.

States, 429 U.S. 990 (1976). The trial court's opinions in this case fail on their face to meet these requirements, a failure of proof which plainly bothered the panel in *Forest Hill I*, and rightly so. Contrariwise, the majority in *Forest Hill II* leap over what is a glaring failure of proof, paying only lip service to this Court's holding in *Dayton I*. Furthermore, the record is barren of any evidence linking the high proportion of blacks at Lincoln Williams to segregative actions on the part of the School Board. All schools in Ward 3 were desegregated thirteen years ago by Judge Hunter's decree. The Fifth Circuit affirmed, declaring the schools in Wards 3 and 4, after implementation of Judge Hunter's plan, in compliance with the law. *Valley* v. *Rapides Parish School Board*, 434 F.2d 144, 153 (5th Cir. 1970). The post-1970 change in the racial mix of the Lecompte area schools, including Lincoln Williams, has nothing to do with segregative actions on the part of the School Board. This failure of proof is fatal, and Judge Scott plainly exceeded his remedial authority in mixing for mixing's sake.[15]

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[15] It is ironic that 13 years ago a white rural school was left standing in Ward 5 of Natchitoches Parish, Louisiana, and the Fifth Circuit refused to order its pairing with a black school located 12 miles away in the same ward, saying: "Theoretically these schools could be paired. A good look at the map indicates the great distance children would be compelled to travel to effectuate the criss-cross between the two plants." *Robertson* v. *Natchitoches Parish School Board*, 431 F.2d 1111, 1113 (5th Cir. 1970). Natchitoches Parish borders Rapides Parish, and we submit that the common-sense approach of *Robertson*, which "separately examin[es] the city schools (Ward 1) and the rural schools (Wards 2 through 10)" (431 F.2d at 1112) and takes into account the geographical isolation of rural schools in parishes as large as Natchitoches (1,297 square miles) ("This Court, of course, cannot alter geography." 431 F.2d at 1113), should also be applied in assessing the soundness of the district court's plan for Rapides Parish (1,369 square miles), which is larger than Natchitoches Parish and which also has a few one-race schools out in the country. Just how this Rapides case differs legally from the Natchitoches case was left unexplained by the panel majority. Contrariwise,

III.

THE TRIAL COURT'S BLIND INSISTENCE UPON CLOSING FOREST HILL SCHOOL IN THE FACE OF THE EXTREME HARDSHIP TO THE COMMUNITY AND THE RISK TO THE SAFETY OF THE CHILDREN INVOLVED PLAINLY EXCEEDS THE LIMITS OF EQUITABLE DISCRETION SET IN *SWANN*.

A. Closing Good Schools Is Not the Business of Federal Courts. The Trial Court Erred in Substituting Its Own View of the Physical Condition of the Lecompte Schools For the Judgment of the Rapides Parish School Board.

In *Swann*, Chief Justice Burger for a unanimous Court said that the closing of a school is one of "the most important functions of local school authorities and also [one] of the most complex." 402 U.S. at 20. We know of no appellate opinion sustaining a federal judge's decision to close an admittedly excellent school facility as a remedy in a school desegregation case. Judge Scott's decision to close Forest Hill School "for purposes of integration" is wholly unprecedented, and we take the position that, in the circumstances of this case, closing Forest Hill School was beyond the remedial authority of Judge Scott and an abuse of his equitable discretion. We submit that decisions to close schools for purposes of desegregation must be left to local school officials, not to federal judges, and where

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Chief Judge Clark, in his dissent, probed the essentials of this case when he stated (App., *infra*, 18a-19a):

> "The record shows without contradiction that the Forest Hill area became predominantly white because of a change in the community's economic industrial conditions which had nothing to do with schools. *Cf. Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436 . . . (1967) [*sic*]. Neither the Lincoln Williams nor the Forest Hill school was constructed or maintained to evade desegregation. The school board has never used either school for racial purposes. The punishment of these innocents fits no crime of their or the district's making."

such decisions are not racially motivated, no federal judge has the power to substitute his own view of the premises and to decide which schools he thinks it best to close. The unsafe conditions at Lecompte Elementary were emphasized by both Board members Kellogg and Holloway in their responses to the trial court's plan, but Judge Scott rejected the idea of closing Lecompte Elementary, relying on his own "detailed personal inspection of these schools" (App., *infra*, 31a). But the Fifth Amendment precludes any federal judge from finding adjudicative facts based on personal inspection of the premises in question dehors the record. *Kennedy* v. *Great Atlantic & Pacific Tea Co.*, 551 F.2d 593 (5th Cir. 1977). Where communities stand to lose their only schools there is every reason to enforce the protective mantle of due process.[16] At any rate, we submit that the questions of comparative physical plant raised in this case are for the Rapides Parish School Board, not for Judge Scott. Otherwise federal courts will assume a role wholly beyond their competence and completely outside the scope of relief contemplated by *Brown II* and *Swann*. "Remedial judicial authority," it must be remembered, "does not put judges automatically in the shoes of school authorities whose powers are plenary." *Swann*, 402 U.S. at 16. "Judicial authority enters only when local authority defaults." *Id.* Nothing in this record suggests that Board members Holloway and Kellogg's concerns over the inadequate facilities and the

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[16] In approving Judge Scott's *ex parte* inspections of the Lecompte schools, which Judge Scott twice admits in his July 22, 1981 opinion (App., *infra*, 30a, 31a), the panel majority says (App., *infra*, 14a n.11): "Forest Hill residents do not dispute the [trial] court's findings as to the adequacy of these schools . . . ." But this is plainly mistaken. In our opening brief in *Forest Hill II*, we told the Fifth Circuit (p. 52): "Certainly the comparative physical plants at Lecompte Elementary, Carter C. Raymond, and Forest Hill were adjudicative facts upon which the parties, including Judge Scott, who made himself a witness in this case, were in basic disagreement." We fail to see how

attendant safety problems at Lecompte Elementary were in any way disingenuous or in default of their responsibilities. We know of no opinion of this Court — certainly not *Swann* — that suggests federal judges can close good schools against the wishes of a local school board where less drastic alternatives are available. The approach of the panel majority in this case is in conflict with the decisions of at least six other Circuit Courts of Appeals, which rightly leave utilization of physical plant to the sound discretion of local school boards. The Eighth Circuit has said that: "The matter of utilization of available facilities is within the province and discretion of the school board." *Haney* v. *Sevier County School Board*, 429 F.2d 364, 372 (8th Cir. 1970). The Fourth Circuit has also rejected the dangerous notion "that it is ordinarily for the district courts to determine which schools shall be closed rather than for the school board," to which the Fourth Circuit replied, "we reject the proposition." *Allen* v. *Ashville City Board of Education*, 434 F.2d 902, 907 (4th Cir. 1970).[17]

With all respect, we submit that the trial court's extra-judicial self-assessment in this case —

> "Anybody can predict what I'm going to do if they're smart enough to know what's best for the school system."[18]

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we could have made our challenge to Judge Scott's findings on this matter more explicit.

[17] *Accord*, *Morgan* v. *Kerrigan*, 401 F.Supp. 216, 245-46 (D. Mass. 1975) (only schools in poor condition closed), *aff'd* 530 F.2d 401 (1st Cir. 1976) (no objection on appeal to closing orders); *Fitzpatrick* v. *Enid Board of Education*, 578 F.2d 858, 862 (10th Cir. 1978) (no showing that "defendants abused their discretion in their utilization of District facilities"); *Penick* v. *Columbus Board of Education*, 583 F.2d 787, 818 (6th Cir. 1978), *aff'd* 443 U.S. 449 (1979) (closing of 33 elementary schools [see 443 U.S. at 490] by local Board, not district court, affirmed); *Mitchell* v. *McCunney*, 651 F.2d 183, 186 (3d Cir. 1981) (school board decision to close schools on account of age and condition affirmed).

[18] *The Shreveport Bossier-City Times*, Feb. 15, 1981, p. 18-A, a front-page

— is quite out of line with the humility demanded of judges who wield the awesome power of desegregation by decree. Judge Scott's bold statement — and there are others of record equally eye-opening[19] — runs quite contrary to the chord of restraint sounded on another extra-judicial occasion by one of our greatest judges, Judge Learned Hand:

> "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs."[20]

B. Forest Hill Elementary School Is the Only School in a Small Rural Community. It is an Excellent Facility Built and Maintained by the People of Forest Hill. The School Is the Center of Community Life. Judge Scott's

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interview with Judge Scott captioned "I'd like to explain." The interview was set forth in full as Appendix D to our opening brief to the Fifth Circuit in *Forest Hill II*. At the same time Judge Scott defended his plan in the local papers, he also permanently enjoined any member of the Forest Hill Community from so much as stepping foot on the ten acres of public property that constitute the Forest Hill School, where upset parents had gathered to protest "quietly and peaceably" (646 F.2d at 934; App., *infra*, 53a) Judge Scott's decision closing their school.

[19] *Item:* "I am going to do this since I am a big cheese." Tr. Jan. 15, 1981 Chambers Proceedings, p. 20.

Item: "I am the best expert that I know and I intend to draw this plan myself." Preliminary Opinion, June 6, 1980, Exhibit A, p. 1 (App., *infra*, 97a). Certainly Judge Scott's claiming to be his own best expert is inconsistent with the humility demanded of judges who wield the awesome power of desegregation by decree: "We approach decision-making here with humility." *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 848 (5th Cir. 1966) (per Wisdom, J.), *aff'd on rehearing en banc* 380 F.2d 385 (5th Cir. 1967), *cert. denied sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967).

[20] L. HAND, THE BILL OF RIGHTS 73 (*The Oliver Wendell Holmes Lectures* 1958).

Unilateral Decision To Close Forest Hill School Can Hardly Be Characterized as an Exercise of Equitable Discretion.

In *Swann*, this Court spoke of the breadth and flexibility inherent in equity:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

402 U.S. at 15. We submit that Judge Scott's plan fails to meet the test of basic fairness set in *Swann*. Judge Scott's plan is basically unfair to the students at Forest Hill, both black and white, who under his plan are bused for 13 years, from kindergarten through the 12th grade, whereas the students in Lecompte are not bused at all.[21] That is plainly an inequitable distribution of the burdens of desegregation. Judge Scott's plan is also totally insensitive to the needs of the people of Forest Hill, whose community life centers around their school and whose hard-earned tax dollars built Forest Hill School.

The district court's rigidity in this case — its singlemindedness of purpose — is faithless to the weighing and balancing of interests inherent in equity. The trial court identified as its "sole purpose" the achievement of the greatest amount of inte-

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[21] True, as noted by the panel majority (App., *infra*, 3a n.3): "Since 1966, all high school students in this southeast portion of Rapides Parish have voluntarily attended the desegregated Rapides High School in Lecompte." But that is hardly a reason for increasing the burden on the elementary students at Forest Hill and for requiring the busing of five-year-olds to Lecompte.

gration possible. Never mind, said the trial court, the "logistical expense" of destroying good schools and busing five-year-olds forty miles and two hours a day. This reasoning, we respectfully submit, is plainly at odds with this Court's teaching in *Swann*. Only Chief Judge Clark's opinion below addresses the devastating practical consequences of closing Lincoln Williams and Forest Hill Schools and busing young children away from home for two hours a day. Only Chief Judge Clark's opinion is merciful enough to weigh the pleas of concerned parents, both black and white, who are justifiably worried about the safety and educational well-being of their children. Desegregation decrees, this Court has said, must be drawn "in light of the circumstances present and the options available," *Green* v. *County School Board*, 391 U.S. 430, 439 (1968), "taking into account the practicalities of the situation." *Davis* v. *School Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971). We think the special circumstances of this case and the practicalities of the situation are best expressed by the testimony (Tr. Sept. 17, 1980 Proceedings, pp. 30-31) of Mary Miles, a black seamstress and mother of a five-year-old child. Her words are straightforward enough:

> "I have a five-year-old child that is entering kindergarten and it looks as if he is going to be bused about thirty-five miles away from home. And I don't see no reason for him to pass by a school to go thirty-five miles to another school, which is — I am about twenty-five miles away from home and if something happens then I have got to come twenty-five miles plus go another fifteen or thirty-five miles to go and pick him up, and I just can't see it. But to me it looks as if the issue is desegregation plan, which I am not for that, I am for saving Forest Hill Elementary School, because if we lose the school out of Forest Hill then that is all we got."

This mother's plea should not go unanswered. *Forest Hill* is a

paradigm case for this Court to speak anew to the Nation on a matter of vital public importance.

C. The United States and the Panel Majority Concede that Judge Scott Failed in His Duty to Make Essential Findings of Fact Regarding the Length of Time of Travel for Students Affected by His Plan. These Concessions Compel a Reversal and Remand.

Judge Scott's finding in his July 22 opinion (App., *infra*, 33a): "there are practically no students living in the Forest Hill district west of Forest Hill city limits" is patently erroneous. It is contradicted by Judge Scott's own admission, later in the same opinion (App., *infra*, 39a) that 23 students live west of Forest Hill in the Mill Creek area; 18 live south of Forest Hill in the Bennett Bay area; 9 live southeast of Forest Hill on Blue Lake Road. Thus some 50 students, by Judge Scott's own count, experience a considerable busing burden under his plan. The Government concedes this much. U.S. Brief [Fifth Circuit], p. 19. Yet the panel majority affirms Judge Scott's plan, leaving these 50 students hanging on the footnote hope (App., *infra*, 13a-14a n.10) of some future modification of a desegregation plan already three years old. This is a dangerous approach to appellate review of desegregation decisions.

Our position is that before any federal judge can decree extensive busing, he must first determine by findings that are capable of appellate review what the facts are regarding the length and time of travel for students affected by such a plan. *Swann*, 402 U.S. at 30-31; *Northcross* v. *Memphis Board of Education*, 444 F.2d 1179, 1183 (6th Cir. 1971); *Thompson* v. *Newport News School Board*, 465 F.2d 83, 88 (4th Cir. 1972) (en banc), *cert. denied* 413 U.S. 920 (1973); *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972) (en banc), *cert. denied* 413 U.S. 922 (1973); *Kelley* v.

Nashville Metropolitan County Board of Education, 687 F.2d 814, 822 (6th Cir. 1982), *cert. denied* 459 U.S. ____ (1983). Certainly a judge should know what the risks to the safety and educational well-being of young children are before he orders his plan into effect. It is remarkable, and yet quite true, that Judge Scott's August 6, 1980 opinion fails on its face to consider the length and time of travel for students affected by his plan. The reader is not even told how far Forest Hill is from Lecompte. Nor is the reader told that under Judge Scott's plan five-year-olds will be bused past their neighborhood school and transported 25 miles and 60 minutes extra a day.[22] Those data, we submit, would give any reader pause.[23] We respectfully but

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[22] The bus driver route sheets introduced as Forest Hill Exhibit 14 show that 181 former Forest Hill Elementary School students must be bused past Forest Hill School en route to Lecompte. These students, including five-year-old kindergarteners, already travel as much as 25 miles to reach Forest Hill School. The route sheets of Troy Murry and Robert Melder, Forest Hill Exhibit 14, show that students are picked up as early as 6:45 a.m. and they are on buses about an hour en route to Lecompte. Contrast the Chief Justice's explicit recital of the busing distance and time in *Swann* (402 U.S. at 30): "The trips for elementary school pupils average about seven miles and the District Court found that they would take 'not over 35 minutes at the most.'"

[23] In *Tasby* v. *Estes*, 572 F.2d 1010 (5th Cir. 1978), a case familiar to this Court, the Fifth Circuit took the position that appellate review of a desegregation decree involving busing is meaningless without adequate findings of fact regarding time and distance:

> "There are no adequate time-and-distance studies in the record in this case. Consequently, we have no means of determining whether the natural boundaries and traffic considerations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing."

572 F.2d at 1014. On review here, certiorari was dismissed as improvidently granted, presumably because this Court also realizes that without adequate findings regarding the times and distances young children are being bused, meaningful appellate review is impossible. *Estes* v. *Metropolitan Branches, Dallas NAACP*, 444 U.S. 437 (1980). On remand, the district court in *Estes* made extensive findings of fact regarding time and distance, and the court exempted children in grades K-3 from bus rides longer than 30 minutes.

firmly submit that where the safety and well-being of young children are at stake, the law requires more than the *ipse dixit* of the district court, however well-meaning or self-confident the trier may be. Otherwise, "the entire federal-court system will experience the disaffection which accompanies violation of Cicero's maxim not to 'lay down one rule in Athens and another rule in Rome.' " *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 492 (1979) (Rehnquist, J. dissenting).

D. Judge Scott Erred in Refusing To Hear Forest Hill's Evidence Regarding the Dangers of Traveling from Forest Hill to Lecompte and the Risks to the Young Children Involved.

When Mr. Roy attempted to introduce the testimony of bus drivers regarding the risks to the young children, Judge Scott cut him off. Tr. June 30, 1981 Proceedings, pp. 56, 70. A duty to find facts necessarily includes a duty to hear relevant evidence bearing on those facts. It was constitutional error for Judge Scott to exclude the proffered testimony. *Swann*, 402 U.S. at 30-31. The Government's and the panel majority's blind refusal to weigh such evidence in considering the soundness of Judge Scott's plan is insensitive at best; at worst, it is dangerous to the safety and health of young children.[24]

Tasby v. *Wright*, 520 F.Supp. 683, 714-733 (N.D. Tex. 1981). Other district courts, after meticulously detailing the times and distances involved, have reached similar results, with circuit court approval. See, *e.g.*, *Thompson* v. *Newport News School Board*, 363 F.Supp. 458, 462-64 (E.D. Va. 1973) (Walter Hoffman, J.) (grades K-2 exempt from busing plan), *aff'd* 498 F.2d 195 (4th Cir. 1974) (en banc); *Smiley* v. *Blevins*, 514 F.Supp. 1248 (S.D. Tex. 1981) (grades K-1 exempt from busing).

[24] We disagree completely with the Government's suggestion (U.S. Brief [Fifth Circuit], p. 37, n.40) that "in view of the nature of this testimony — *i.e.*, kindergarteners soiling their pants while on the school buses — the exclusion was proper." Unlike the Government, concerned parents everywhere would naturally worry about five-year-olds soiling their pants while on a ten-mile bus ride to school. Moreover, the proffered testimony also shows that the bus

IV.

LESS DRASTIC REMEDIAL ALTERNATIVES WERE AVAILABLE TO THE DISTRICT COURT TO CORRECT THE CONDITION IT FOUND IN VIOLATION OF THE CONSTITUTION.

A. Judge Scott's Disregard of Neighborhood Considerations for Rural Schools and His Peremptory Rejection of Private Plaintiffs' Proposal To Allow Lincoln Williams and Forest Hill To Remain K-3 Schools Is Unreasonable and a Denial of Equal Protection of the Laws.

In *Forest Hill I* a unanimous panel of the Fifth Circuit said that Judge Scott's statement that neighborhood schools do not exist outside of metropolitan areas was a "curious observation," and the panel went on to hold (App., *infra*, 62a):

> "The appellants contend that the district court erred in failing to accord the same respect to neighborhood schools in rural areas as to those in Alexandria; the comment that there can be no rural neighborhood schools is cited as an example of this asserted misconception. We agree that the comment, taken in its absolute context, is clearly erroneous. A review of case law concerning the neighborhood school concept will reveal that it should apply equally to metropolitan and rural facilities."

Having corrected Judge Scott as a matter of law, the *Forest Hill I* panel reversed and remanded for a re-examination of specific desegregation measures, saying (App., *infra*, 66a):

> "We cannot ignore the district court's disregard of neighborhood considerations for rural schools in this context, particularly where K-2 students in Alexandria were spared transfer to the point that three schools remain virtually all-black."

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drivers "recalled accidents on the bus where the little kindergarten kids, one would fall asleep, fall on the floor, and ruin their pants." Tr. June 30, 1981 Proceedings, p. 70.

This last statement gave the parents of Forest Hill, both black and white, hope at last. And the Court's clue led private plaintiffs to propose that Lincoln Williams and Forest Hill remain open as K-3 schools. But Judge Scott rejected this proposal, quite peremptorily, with the cryptic comment (App., *infra*, 35a): "We cannot allow K-3 schools . . . ." Judge Scott did not explain why K-3 schools were impermissible.

On Forest Hill's second appeal to the Fifth Circuit, the United States conceded Judge Scott had misstated the law of the Fifth Circuit in this regard. U.S. Brief [Fifth Circuit], pp. 28-29 n.33. Indeed, in *Lee* v. *Macon County Board of Education*, 616 F.2d 805, 812 (5th Cir. 1980), the Fifth Circuit noted that there is nothing unlawful about omitting grades K-3 from a pairing or grouping program where good reasons for doing so appear in the record. Since in this case Judge Scott left three all-black neighborhood schools intact in Alexandria, we submit the young children in the rural parts of the Parish, both black and white, are entitled to the same treatment under the Fifth Amendment's guarantee of equal protection of the laws and under the test of basic fairness laid down in *Swann*.[25] The panel majority in *Forest Hill II*, instead of rationalizing Judge Scott's cryptic rejection of the K-3 proposal, should have instructed Judge Scott to exercise his discretion — "in the first instance"[26] — in accordance with the law of the Fifth Circuit,

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[25] What was good law in Montgomery County, Alabama, is good law in Rapides Parish, Louisiana:

> "It cannot be denied that there is value in having elementary children attend schools near their homes. Recognition of this benefit of neighborhood elementary schools does not constitute abandonment of the goal of desegregation as required by the United States Constitution."

Carr v. *Montgomery County Board of Education*, 377 F.Supp. 1123, 1138 (M.D. Ala. 1974) (per Johnson, C.J.) *aff'd* 511 F.2d 1374 (5th Cir. 1975), *cert. denied* 423 U.S. 986 (1975).

[26] *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977). In

precisely as did the earlier unanimous panel in *Forest Hill I*. The Fifth Circuit has never required the busing of five-year-olds: "We have uniformly held that kindergarten children need not be included in desegregation plans . . . ." *Pitts* v. *Cherry*, 598 F.2d 1005, 1006 (5th Cir. 1979) (citations omitted). Plainly, the panel majority in this case erred in ruling, as a matter of law, that *Swann* requires all grades to be bused, regardless of the times and distances of busing and the threat to the safety and educational well-being of the children involved.[27] Such a harsh result, particularly in a case involving a rural com-

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Dayton I this Court cautioned that: "The proper observance of the division of functions between the federal trial courts and the federal appellate courts is important in every case. It is especially important in a [desegregation] case . . . ." 433 U.S. at 410.

[27] Citing this Court's denial of certiorari in the Nashville case, *Kelley* v. *Nashville Metropolitan County Board of Education*, 687 F.2d 814 (6th Cir. 1982), *cert. denied* 459 U.S. ___ (1983), the panel majority stated (App., *infra*, 12a): "This constitutionally erected barrier to the operation of segregated schools applies to all children within the school system, including those in elementary grades." In *Kelley*, the Sixth Circuit rightly objected to a district judge's order that would have left 47 of 75 elementary schools more than 90% one-race, with 14 schools projected as more than three-fourths black. See 687 F.2d at 820. But that is a far cry from the situation in Rapides Parish viewed as a whole. The panel majority has read far too much into this Court's denial of certiorari in *Kelley*. A much better window to this Court's thinking on the matter of busing elementary-age children is the following excerpt from the oral argument in the *Estes* case, *supra* note 23, which was argued in this Court on October 29, 1979:

> "THE COURT: Well, doesn't the district court have some discretion when it comes to very young children in saying there shall be less bussing with respect to them than with respect to older children?
> "MR. WALLACE [Deputy Solicitor General]: Some discretion based on adequate factual inquiry and findings.
> "THE COURT: Didn't *Swann* say precisely that, Mr. Wallace?
> "MR. WALLACE: *Swann* did say that, and I answered consistently with that answer."

Tr. Oral Arg. pp. 39-40 (Hoover Reporting Co., Inc.), reproduced in THE COMPLETE ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 1979 TERM (University Publications of America Inc.; microfiche).

munity's only school, is certainly not required by *Swann*. Furthermore, the panel majority's approach in the instant case is squarely at odds with the law of the Fourth Circuit:

> "If certain proper circumstances may justify an entire school remaining of one race then, *a fortiori*, the same circumstances will justify the two lowest grades and kindergarten remaining predominantly of one race, especially considering the time of travel and age of the children."

Thompson v. *Newport News School Board*, 363 F.Supp. 458, 463-64 (E.D. Va. 1973), *aff'd* 489 F.2d 195 (4th Cir. 1974) (en banc).

B. Judge Scott's Rejection of Forest Hill Plan 2 and School Board Plans 1, 2, and 3 Because They Proposed Busing Blacks into Forest Hill Is Unwarranted in Law.

Judge Scott rejected various plans zoning blacks into Forest Hill because he said (App., *infra*, 35a) they would involve "segregated bussing" in violation of the Constitution.[28] Manifestly, this is legal error. There is nothing illegal about proposals to bus blacks into Forest Hill, especially since white students at Forest Hill have been bused to Rapides Senior High School in Lecompte since 1966.[29] Likewise Judge Scott's rejection of the School Board's proposal to zone K-5 blacks from Lecompte to Forest Hill was based on a misunderstanding of

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[28] The district court is quite mistaken in saying (App., *infra*, 35a): "We doubt seriously if there are 15 black students in the Woodworth area." In point of record fact, certified copies of the trip tickets of bus drivers Alex Baker, Jr., J. D. Glass, and Vernon Linzey show that 31 black elementary students live in the Woodworth area and could easily be bused the shorter route to Forest Hill. Forest Hill Exhibit 14; Tr. June 30, 1981 Proceeding, pp. 55-56 (testimony of Parks W. Sansing).

[29] The district court and the panel majority view the Cheneyville, Forest Hill, and Lecompte schools "as integral elements of a single educational

the law. Judge Scott took the position (App., *infra*, 36a) that "Students in a one-race zone can be bussed for purposes of integration but they should not be bussed to a K-5 zone when a K-5 school exists in their own zone." The obvious question at this point is what about the 181 Forest Hill students who are bused past their neighborhood school under Judge Scott's plan? At any rate, Judge Scott is quite mistaken in saying he was powerless to zone K-5 blacks from the Lecompte area into the Forest Hill School. Non-contiguous subzoning is a well-established desegregation tool in the Fifth Circuit and elsewhere. See, *e.g.*, *Lee* v. *Macon County Board of Education*, 616 F.2d 805 (5th Cir. 1980); *Swann*, 402 U.S. at 27.

It is apparent from the above, that at least three legal errors cabined the exercise of the trial court's discretion within too narrow bounds. In these circumstances, a reversal and remand, under proper instructions as to the law, are in order. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977). With regard to other plans, all we can do here is point to the transcript of the June 30, 1981 hearing on remand, which shows a concerted effort on the part of the plaintiffs, the Rapides Parish School Board, and Forest Hill intervenors to draw up a realistic plan, one that promised to work effectively

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network" (App., *infra*, 9a), and both the trial court (App., *infra*, 39a) and the panel majority (App., *infra*, 3a n.3) make much of the fact that Forest Hill students have voluntarily attended Rapides Senior High School in Lecompte since 1966. But the record is uncontradicted that when Rapides Senior High School Consolidated Taxing District 61 was voted upon favorably:

> "the *sine qua non* and/or *quid pro quo* for the passage of the bond election in 1964 to erect and construct Rapides Senior High School were the reciprocal agreements and understandings among *all* of the citizens of the areas involved, that the elementary schools in Forest Hill, Louisiana, Cheneyville, Louisiana, and Lecompte, Louisiana, would remain open and in their communities."

Affidavit of School Superintendent E. Allen Nichols, 3 June 1982, 2nd Supp. R., Exhibit "C", para. 7.

while at the same time not destroying good schools so badly needed by both blacks and whites alike.[30] We would also respectfully direct this Court's attention to the dissenting opinion of Chief Judge Clark where a realistic and less drastic alternative plan is plainly set forth.

CONCLUSION

It would be easy for this Court to dispose of this case on the general proposition that district courts have broad discretion in desegregation cases. And of course they do. But as Chief Justice Marshall stated long ago, to say that the matter is within a court's discretion means that it is addressed not to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States* v. *Burr*, 25 Fed. Cas. 30, 35 (1807). The decision to close Forest Hill School rests on grounds that cannot be supported, and the questions presented are substantial.[31] This Court should therefore grant the petition for writ of certiorari.

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[30] In *Green* v. *County School Board*, *supra*, this Court emphasized that desegregation plans must "promise[ ] realistically to work, and promise[ ] realistically to work *now*." 391 U.S. at 439. In point of fact (App., *infra*, 38a), only 47 of 311 former Forest Hill Elementary School students have remained in the public school system. One wonders how any plan that closes two good schools and runs both blacks and whites out of the public school system and into their neighborhood Baptist church for their schooling can be said to be "realistic" in any rational sense. During the 1980-81 academic year, 178 students attended the Forest Hill Free School, which was built on the premises of the local Baptist church in Forest Hill. The latest figures, for 1981-82, show an increase in the number of students attending the Forest Hill Free School to 198, including 7 black children. A photograph showing the protest of the parents of Forest Hill on the opening day of the 1981-82 school year appears *infra*, Appendix T, 111a.

[31] Forest Hill School remains intact. A janitor has cleaned the rooms and maintained the grounds for three years. None of the School's furnishings has been moved. It is not too late to save it.

We leave the last word to Webster:

> "'Sir, you may destroy this little Institution; it is weak; it is in your hands! . . . You may put it out.
>
> "'It is, Sir, as I have said, a small College. And yet, *there are those who love it*—.' "[32]

Respectfully submitted,

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[32] These lines, of course, are from Webster's immortal peroration in the *Dartmouth College Case*. They do not appear in Henry Wheaton's official report of the case, *Dartmouth College* v. *Woodward*, 4 Wheat. 518 (1818). They were, however, preserved for students of the law in Rufus Choate's *Eulogy on Daniel Webster* (1853), in I THE WORKS OF RUFUS CHOATE WITH A MEMOIR OF HIS LIFE 493, 516 (S. G. Brown, ed. Boston 1862) (emphasis in original).